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No. 718

# In the Supreme Court of the United States

October Term, 1961

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Harry Murray, Petitioner

v.

United States of America

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 713

EDWIN MURRAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 25-41) is not yet reported. The two opinions of the district court (R. 28a, 29a)[1] defying pretrial motions are also unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 10, 1962 (Pet. App. 25). The petition for a writ of certiorari was filed February 8, 1962.

[1] The record before this Court is comprised of the printed appendices to the briefs in the court of appeals. References to appellant's appendix will be designated "R." References to the government's appendix will be designated "R'."

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was entitled under the Administrative Procedure Act to a pretrial inspection, or to copies, of the transcripts of statements he had given to internal revenue agents during their investigation of his income tax affairs.

2. Whether petitioner's pretrial motion for inspection or copies under Rules 16 and 17(c) should have been granted.

3. Whether it was error to permit the government to impeach one of its own witnesses by questions as to her prior convictions which carried the implication that petitioner was also involved.

4. Whether the government's demand for corporate books, directed to defense counsel in the presence of the jury, constituted grounds for a mistrial.

5. Whether the prosecutor improperly argued to the jury that there was no proof that petitioner was entitled to claim certain exemptions.

6. Whether the evidence was sufficient to sustain the verdict.

## STATUTE AND RULES INVOLVED

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*:

> SEC. 6. Except as otherwise provided in this Act—
>
> * * * * *
>
> (b) *Investigations.*—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or en

forced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

* * * * *

(5 U.S.C. 1005(b).)

Federal Rules of Criminal Procedure:

Rule 16. Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. Subpoena

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on mo-

tion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * * *

## STATEMENT

On February 19, 1959, petitioner was indicted in the United States District Court for the Southern District of New York in a two-count indictment charging him with the willful attempt to evade income taxes by the filing of false and fraudulent returns for the calendar years 1952 and 1953, in violation of Section 145(b) of the Internal Revenue Code of 1939. The reported and correct taxable income and tax liability, as alleged in the respective counts of the indictment, are as follows (R. 3a–4a):

| | Income | | Tax | |
|---|---|---|---|---|
| | *Reported* | *Correct* | *Reported* | *Correct* |
| 1952 | $6,504.45 | $24,017.60 | $1,488.29 | $5,853.15 |
| 1953 | 4,038.00 | 19,838.82 | 797.78 | 5,787.31 |

On October 27, 1960, after a jury trial, petitioner was convicted on both counts (R. 2a). On the following day he was sentenced to imprisonment for a period of one year and one day and was fined $5,000 (R. 5a–6a).

1. The evidence to support the verdict may be summarized as follows:

During the investigation of the case, petitioner admitted to the agents that his principal income for the years involved came from gambling (R. 37a, 40a, 59a–61a, 67a), and that he had no records to support the figures in his returns (R. 60a, 67a, 72a; R'. 9a–10a). The agents thereupon assembled a statement of assets and liabilities which showed that petitioner's net worth had increased approximately $31,000 during 1951 and 1952, over and above the $10,500 of income he had actually reported in the returns (R. 38a, 175a–177a, 225a–227a).[2] A house purchased in 1952 for $23,000, and over $18,000 spent in making improvements on it, accounted for practically all of the increase in net worth (R. 98a, 177a–179a).

Petitioner voluntarily conferred with the agents four different times in an effort to explain the origin of the money used for the house (R. 30a, 41a–43a, 169a–170a), and each time he gave a different story. At first he said that the money came from funds he had accumulated over the years and had kept in a safe at home (R. 62a–63a). After the agents had discovered and pointed out to him that a good portion of this money must have been used to pay income tax deficiencies in previous years (R. 62a–64a, 68a), petitioner stated that he had put $13,000 of accumulated gambling winnings into the house, plus an additional $12,000 which he had borrowed from certain gamblers whom he refused to name because they might kill him

[2] The starting point of this net worth proof was a statement of assets and liabilities as of May 3, 1949, which petitioner had submitted to the Internal Revenue Service in connection with an offer to compromise earlier income tax deficiencies (R. 31a–34a).

(R. 67a–68a). Still later, when asked again to identify the gamblers, he said that his previous statement was untrue and that he had borrowed $13,000 to $15,000 from a real estate man named John Lamb (R. 114a, 163a). Finally, he stated that he had borrowed $32,000 from Lamb to cover both the purchase and the improvements, that his previous statements were false, and that he had been nervous and scared when he made them (R. 38a–39a, 43a). He claimed that he had repaid Lamb in 1954 or 1955, but there were neither witnesses nor documentary evidence to support either the loan or the repayment.[1] (R. 39a–40a.) Lamb had died in October 1955 (R. 162a).

At the trial, the defense endeavored to develop proof that petitioner had borrowed $32,000 from Lamb in 1952 (R. 104a–105a, 109a–110a, 115a–116a, 182a–185a, 186a, 193a). The government presented proof of Lamb's straitened financial condition from the time of the alleged loan in 1952 until his death in 1955: Lamb's monthly bank balance had been between $500 and $600 (R. 172a); he had not owned a car and had lived in his office (R. 145a); he had borrowed small sums which he had not repaid (R. 145a, 153a); he had been dispossessed from his office for failure to pay rent (R. 142a); and he had lived in a church home for a few months before death but had been unable to pay the weekly rent of four dollars (R. 141a–142a).

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[1] Petitioner stated that the money to repay Lamb had been borrowed from three sources. He had previously informed the agents that these same borrowed funds had been used for gambling purposes. (R. 52a–53a.)

2. In September 1959, over a year prior to trial, counsel for petitioner filed a motion alleging that the statements petitioner made to the agents during the investigation had been taken down and transcribed by a stenographer, that copies were necessary for adequate preparation of the defense, and that petitioner was entitled to them under the Administrative Procedure Act, and praying that the government be required to produce the statements for inspection and copying (R. 1a–2a, 21a–25a). The government's opposition pointed out that petitioner had appeared voluntarily to make the statements, that he had been accompanied on each instance by Milton Sloane, an attorney and Certified Public Accountant, who had represented him for thirteen years, and that Mr. Sloane had taken notes during the interviews (R. 26a–27a). The court denied the motion, holding that there had been no showing that the statements were either material to the defense or evidentiary and that petitioner was not entitled to them under the Administrative Procedure Act because his appearances before the agents had been voluntary rather than under compulsion by summons (R. 28a).

Mr. Sloane died in April 1960 (R. 172a), about six months prior to the beginning of the trial. The motion for production and inspection was not renewed.[1]

At the trial, the government introduced two of the statements in evidence and read parts of them to the jury (R. 56a–70a; R. 3a–11a). There was no ob-

[1] Petitioner has been represented by the same counsel throughout the court proceedings, at least since the filing of the motion to produce (R. 22a).

jection; the defense did not claim surprise at any of the contents; there was no request for time to study them. Indeed, defense counsel read some passages from the statements to the jury himself (R. 70a–73a; R. 12a–13a). There was evidence at the trial that Sloame had asked the agents for a copy of petitioner's statement at the conclusion of each interview, that the agents had informed Sloame that the policy of the Internal Revenue Service was to give the taxpayer a copy of his statement after he had come in to the office to sign it, and that this policy would have been followed in petitioner's case but for the fact that petitioner had never returned to sign and receive his copy (R. 46a–48a, 164a–167a).

## ARGUMENT

1. Petitioner contends (Pet. 2, 10–11, 13–16) that his statements to the agents during the investigation were "compelled" within the meaning of Section 6(b) of the Administrative Procedure Act (*supra*, pp. 2–3), and that he was, therefore, entitled to copies of the transcripts. Pointing to a clause in the Committee reports on the Act, *i.e.*, "whether or not a formal subpoena is actually issued" (Pet. 14), petitioner argues that Congress had recognized that compulsion is inherent even when an agency merely requests testimony from an intended party without making a formal demand.

On the basis of petitioner's argument, a witness would be entitled to a transcript of his statement in practically every instance. This interpretation of Section 6(b) would render nugatory the statutory

term, "compelled". The language of the statute is properly applicable only where testimony has been in some manner "compelled" in the sense that a formal subpoena has been issued or a threat of the issuance of a subpoena has been made. The legislative history cited by petitioner (Pet. 14) contains no evidence that Congress intended otherwise. In the present case, since petitioner was under investigation for possible criminal prosecution, no subpoena or threat of subpoena or anything else could have "compelled" petitioner to submit to questioning, for petitioner at all times could have invoked his privilege against self-incrimination. The record leaves no doubt that petitioner turned over his books and records to the agents voluntarily, and voluntarily submitted to questioning at each of the several interviews (R. 169a–170a); at which petitioner's counsel, Sloane, was always present.[5]

Furthermore, even if petitioner could conceivably be considered as having been "compelled," he has been unable to show the slightest prejudice resulting from his failure to obtain the transcripts. In "a non-public investigatory proceeding," likely to result in a prosecution, which was the type of investigation conducted by the revenue agents,[6] the most petitioner would have been entitled to under Section 6(b) would have been an inspection of the relevant

[5] In one instance, Sloane, then acting as counsel for petitioner, actually offered him for questioning without request by the agents (R. 164a–165a).

[6] See *Brownson* v. *United States*, 32 F. 2d 844, 848 (C.A. 8th); *Torras* v. *Stridley*, 103 F. Supp. 737, 739–740 (N.D. Ga.).

portions of the transcripts, or to a copy if needed.[7] Although the agents informed petitioner's counsel, Sloane, that the transcripts could be inspected and explained the procedure to obtain copies, petitioner did not avail himself of the opportunity (see the Statement, *supra*, p. 8).

Moreover, despite petitioner's present protestations that the transcripts were necessary to his trial counsel after the death of Sloane (Pet. 8, 20), the record reveals no basis for this claim of prejudice. Sloane, who had acted as counsel for petitioner at all the interviews with the agents and who had made notes of the proceedings, died six months after the motion for production of the statements and six months before the trial (see the Statement, *supra*, p. 7). Had Sloane's personal knowledge been so necessary, or had his notes been missing, trial counsel would certainly have renewed the motion after his death. But counsel did not do so. The statements were introduced in evidence without objection, without claim of surprise, and without a request for adjournment by the defense. Since the petitioner rejected his opportunities to inspect the transcripts and cannot now show his defense was weakened by the lack of them at the trial, further review is not warranted.[8]

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[7] See S. Rep. No. 732, 79th Cong., 1st Sess., pp. 19-20; H. Rep. No. 1980, 79th Cong., 2d Sess., p. 33.

[8] *Edwards* v. *United States*, 312 U.S. 473, cited by petitioner (Pet. 11, 13), is not in point. Edwards, who had been indicted for violations of the Securities Act, had filed a plea in bar alleging that he was entitled to statutory immunity because he had been compelled to give self-incriminating testimony before the Securities and Exchange Commission. This Court simply

2. There is no merit to petitioner's further contention (Pet. 2–3, 11–12, 16–20) that the trial court erred, to his prejudice, in denying the request for production of the statements under Rules 16 and 17(c), F. R. Crim. P. (*supra*, pp. 3–4). Trial counsel had ample opportunity to avail themselves of Sloane's knowledge of the interviews while he was still alive. As the court below stated (Pet. App. 41):

> We cannot say that there may never be a situation where it would be appropriate to allow a defendant to examine his own statement before trial. Here, however, Murray had made no showing of such special need. Murray had counsel with him at each interview and it is hardly to be supposed that he and his counsel were without any notes of what had happened and without any memory of what was said. Under ordinary circumstances, such as these, we see no reason why there should not be sufficient time for defense counsel to make whatever impeaching or bolstering use of a statement he can if he obtains the transcript at trial. Murray has made no showing that he was in any way prejudiced by reason of not having had his statements made available to him before trial.

Although the Second Circuit took a somewhat more restricted view of pretrial production of a defendant's statements under Rule 17(c) (see Pet. App. 40) than did the District of Columbia Circuit in *Fryer* v. *United States*, 207 F. 2d 134, certiorari denied, 346

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held that there could not be a proper ruling on the plea in bar in the absence of a transcript of the proceedings before the Commission.

U.S. 885,* the Second Circuit also recognized in the passage quoted above that in some circumstances it would be appropriate to allow the pretrial production of a defendant's statements. Furthermore, the actual holding in *Fryer* is in accord with the holding in the present case, for there, as here, the defendant's statements were produced at the trial, and the court of appeals found that, under the circumstances, Fryer had suffered no prejudice from the denial of his pretrial motion. Thus the opinion in *Fryer* presents no clear conflict with the present opinion, which requires further review.

Petitioner's reliance (Pet. 12, 20) on *Gordon* v. *United States*, 344 U.S. 414, for the proposition that statements given to government agents are producible as documentary evidence, is misplaced. All that the *Gordon* case decided was that, in the particular circumstances of that case, where it was clear that prior statements of a *prosecution witness* indicated a different version of events from the one to which the witness was testifying, the documents should have been made available to the defense *at the trial* for their traditional purpose of impeachment.

3. Petitioner complains (Pet. 8, 21) that the government was allowed to cross-examine its own witness, Lillian Smith, in such a manner as to convey to the jury the impression that he had been involved in the same "policy gambling" activities for which she had

*The *Fryer* case does not deal with Rule 16, and there appear to be no court of appeals decisions on that rule which differ from the holding in the present case.

incurred several convictions. Even if the cross-examination had been improper, petitioner could have suffered no possible prejudice from Smith's testimony, since petitioner's own admissions of involvement in "policy gambling" had been placed before the jury long before Smith took the stand (R. 40a, 58a-60a).

4. There is no basis to the contention (Pet. 8-9, 22), that petitioner's privilege against self-incrimination was violated when the prosecutor called upon defense counsel, in the presence of the jury, to produce certain corporate records. The mere demand for corporate records in the presence of the jury could hardly violate petitioner's personal privilege against self-incrimination. Moreover, the prosecutor had repeatedly asked for these corporate records, out of the presence of the jury, and the trial judge had ultimately directed defense counsel to produce them. Although counsel brought them to court, they still refused to let the prosecutor see them. Only then was the demand made. (R. 73a-74a.) Petitioner complains further that he turned over personal records and books along with the records of the corporation. But the prosecutor did not ask for personal records, and petitioner made no objection on the basis that his personal books were included when he turned over the corporate records. (R. 73a; see R. 79a)—an objection which could have been made

The government put Smith on the stand to establish the source of the $25,000 cash petitioner paid for the house. She testified that he won a large sum gambling a few months before the purchase. (R. 95a-98a, 115a-119a.)

outside the presence of the jury. Petitioner therefore is in no position to complain. (R. 78a–81a.)

5. Petitioner failed to claim exemptions for his three children in his income tax returns for the years involved, but the government, in making its computations at the trial, allowed the $1,800 deduction. Petitioner's counsel then argued to the jury that the failure to claim the $1,800 deduction was proof that petitioner was not the type of man who would cheat the government of its taxes. The government countered by pointing out that there was no proof in the record that he had actually supported the children. (R. 217a–219a.) Petitioner now complains (Pet. 9, 22) that the trial court should have instructed the jury on the point. This dispute was purely a matter of argument on the facts, and the trial judge was clearly correct in leaving it to the jury to decide the case under proper general instructions.

6. Finally there is obviously no merit to the contention (Pet. 9, 10, 23) that the government had failed to refute petitioner's story that the money for the new house and the improvements that went into it had come from a loan from John Lamb. Upon the facts set out in the Statement (*supra*, pp. 5–6), it is clear that reasonable men could have concluded beyond a reasonable doubt that the Lamb loan story was incredible.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1962.